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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ARMANDO ROCHA SANCHEZ, Plaintiff and Respondent, v. MORTON MAZAHERI, Defendant and Appellant.	E045882 (Super.Ct.No. INC063804) OPINION

APPEAL from the Superior Court of Riverside County. James A. Cox, Judge. Affirmed.

Robinson Di Lando and Michael C. Robinson, Jr., for Defendant and Appellant.

Lynne Romano for Plaintiff and Respondent.

Morton Mazaheri appeals following a default judgment. He contends that the pleadings and proof were insufficient to support the default judgment (a permanent injunction prohibiting Mazaheri's nonjudicial foreclosure sale of Armando Sanchez's real

property) and that the court abused its discretion when it denied his motion to set aside the default. Finding no error or abuse of discretion, we affirm the judgment.

BACKGROUND

On December 26, 2006, Sanchez filed a complaint against Mazaheri and Asset Foreclosure Services, Inc., seeking an injunction prohibiting a nonjudicial foreclosure sale of a property located at 30-565 Avenida Maravilla in Cathedral City, as well as damages for constructive fraud and failure to reconvey a trust deed pursuant to Civil Code section 2941 and declaratory relief.[1]

In his complaint and in his declaration in support of his motion for a preliminary injunction, Sanchez alleged the following facts. In February 1981, Sanchez and his then wife, Silvia Curiel De Rocha, purchased the property from Mazaheri. The grant deed was recorded on March 10, 1981. On February 18, 1981, Mazaheri had obtained a loan from U.S. Savings and Loan Association in the amount of $46,500 secured by a trust deed on the property. From the proceeds, Mazaheri paid off a prior trust deed and received net proceeds in the amount of $33,569.80. Sanchez took title to the property subject to the U.S. Savings and Loan trust deed in the amount of $46,500, and executed a promissory note in the amount of $6,500 payable to Mazaheri. The note was secured by

[1] Asset Foreclosure Services, Inc. is not a party to the appeal. It filed a declaration with the trial court stating that it was the trustee under the deed of trust and had no financial or other interest in the property and agreeing to be bound by any order or judgment of the court regarding the deed of trust.

a deed of trust in that amount, second to the U.S. Savings and Loan trust deed. Sanchez also paid Mazaheri $5,000 as a down payment. The total purchase price was $58,000.

Sanchez began making monthly payments to U.S. Savings and Loan, and later to Chase Home Finance, which purchased the trust deed, until the balance was paid in full in August 2006.

The note in favor of Mazaheri provided that Sanchez had the option to pay interest only at the end of two years and extend the note for one year. On March 31, 1983, Sanchez exercised that option, paying Mazaheri $1,560 in interest. Sanchez paid that amount in cash, which he delivered to Barbara Ross, the office manager in Mazaheri's medical office.[2] Between March 1983 and March 1984, Sanchez made cash payments to Mazaheri, via Barbara Ross, sufficient to pay off the remaining balance on the note. He received a receipt for each payment from Ross. The final receipt stated that the note was paid in full. However, by the time Mazaheri made his demand in October 2005, the receipts could not be found.

In 1984, Sanchez was not aware that reconveyance of the trust deed was necessary in order to clear title. Sanchez became aware that reconveyance was required and that no reconveyance of the trust deed had been recorded when, in 2005, he attempted to refinance the property. In October 2005, Mazaheri made demand for payment of $43,000, claiming that no payment had been made since 1981. He threatened foreclosure

[2] Mazaheri is a plastic surgeon, with an office in Los Angeles.

based on a claimed debt of $43,000. He made a second demand for that amount in November.

On October 17, 2006, Mazaheri caused a notice of default to be recorded, stating that the principal amount due was $6,500 and that the total due, as of that date, was $26,552.90.

On December 28, 2005, Sanchez filed an ex parte application for an order to show cause (OSC) for a preliminary injunction. The court issued the OSC, setting the hearing for January 26, 2007. Mazaheri's response to the OSC was due on or before January 15, 2007, assuming he was served with the summons and complaint and the OSC no later than January 5, 2007. Mazaheri was served personally on January 3, 2007. He did not file any opposition. On January 26, 2007, he filed a request, in propria persona, to postpone the hearing, asserting that he was required by arrangements made months before to be out of the country from January 17, 2007, until at least March 2, 2007, on a humanitarian mission to perform reconstructive surgery on indigent people in the Middle East. However, as Sanchez's attorney pointed out in her opposition, Mazaheri signed his declaration in West Los Angeles, California on January 23, 2007, and faxed it to her from his office in Los Angeles, with a handwritten note, that same day. She attached a copy of the receipt for his airline ticket to Dubai, which Mazaheri had attached to the request for postponement he faxed to her. The ticket receipt showed that the ticket was purchased on January 3, 2007, the same day he was served with the summons and complaint and the

OSC. She also pointed out that, as stated in the motion for preliminary injunction, the foreclosure sale could be held as early as February 8, 2007.

The court denied the requested postponement. After a hearing on January 26, 2007, at which Mazaheri was represented by counsel who made a general appearance, the court issued the preliminary injunction on February 7, 2007.[3]

Mazaheri did not file an answer to the complaint by the February 2, 2007, due date and did not seek an extension of time to do so. On March 28, 2007, Sanchez filed and served a request to enter default. Default was entered on that date.

On April 24, 2007, Mazaheri filed a motion for relief from default pursuant to Code of Civil Procedure section 473, claiming excusable neglect. He was again acting in propria persona. The court denied the motion. The court also denied Mazaheri's subsequent motion for reconsideration.

The default prove-up hearing was held on March 11, 2008. The court issued a permanent injunction prohibiting the foreclosure sale. The court found that Sanchez had

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[3] Mazaheri appears to imply, at least, that the attorney made a special appearance rather than a general appearance. He states that the attorney represented to the court that he was representing Mazaheri in another matter and was appearing on Mazaheri's behalf in this case because Mazaheri "was leaving to go out of the country." He cites to the reporter's transcript of the proceedings on January 26, 2007, which he admits is not part of the record on appeal. He claims that he designated it as part of the record in his designation filed on or about May 19, 2008, but that it was omitted from the reporter's transcript filed September 22, 2008.

The record contains no designation of reporter's transcript filed by Mazaheri, and Mazaheri has not filed any request to augment or correct the record to include this transcript. Consequently, we disregard any matters supported by reference to a reporter's transcript of proceedings on January 26, 2007. The court's order states that the attorney made a general appearance.

paid his obligation on the note in favor of Mazaheri in full, that Mazaheri had engaged in constructive fraud, and that Mazaheri had wrongfully failed to execute a reconveyance of the trust deed. It granted judgment on all causes of action. It awarded Sanchez statutory damages in the amount of $500 (for failure to reconvey the deed of trust, pursuant to Civil Code section 2941) and costs and attorney fees in the amounts of $495 and $13,942.50, respectively. Sanchez served and filed notice of entry of judgment on that same date.

Mazaheri filed a timely notice of appeal on May 9, 2008.

LEGAL ANALYSIS

THE JUDGMENT MAY NOT BE SET ASIDE ON THE BASIS OF DEFICIENCIES OF PLEADING OR PROOF

Mazaheri contends that the judgment must be set aside because of deficiencies in the pleading and because the evidence was insufficient to support it.

On an appeal from a default judgment, a review of the sufficiency of the evidence is not available. (*Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1303; *Corona v. Lundigan* (1984) 158 Cal.App.3d 764, 766-767; *Heathman v. Vant* (1959) 172 Cal.App.2d 639, 644.) Consequently, to the extent that Mazaheri's arguments are based on the insufficiency of the evidence to support the judgment, we disregard them.

Mazaheri also argues, however, that the complaint was insufficient to support the verdict because it failed to allege that payments made to his office manager, Barbara Ross, constituted payments made to him in satisfaction of the terms of the note, either on

the basis of an agreement between Sanchez and Mazaheri for that method of payment or on the basis that Mazaheri authorized Ross to be his agent with authority to accept payments on his behalf. He relies on what has been called "the well-pleaded complaint doctrine." (*Molen v. Friedman* (1998) 64 Cal.App.4th 1149, 1153 (*Molen*).)

The "well-pleaded complaint doctrine" is based on a passage from Witkin's treatise on California civil procedure, which states: "A defendant who fails to answer admits only facts that are well pleaded. (See 5 [Witkin] *Cal. Proc.* (5th), *Pleading*, § 1051.) If the complaint fails to state a cause of action or the allegations do not support the demand for relief, the plaintiff is no more entitled to that relief by default judgment than if the defendant had expressly admitted all the allegations. Such a default judgment is erroneous, and will be reversed on appeal. [Citations.]" (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 183, p. 622.) However, as the court pointed out in *Molen*, *supra*, 64 Cal.App.4th 1149, this passage conflicts with early California Supreme Court cases which hold that ". . . a judgment is not void if the court has jurisdiction of the parties and of the subject matter, irrespective of whether or not the complaint states a cause of action so long as it apprises the defendant of the nature of the plaintiff's demand. [Citations.]" (*Christerson v. French* (1919) 180 Cal. 523, 525-526 (*Christerson*); see *Molen*, at p. 1154.)

The rule stated in *Christerson*, *supra*, 180 Cal. 523 has never been repudiated by the California Supreme Court. *Molen* points out, however, that the intermediate courts of appeal adopted the rule as stated in Witkin without examining the California Supreme

Court precedent. (*Molen, supra,* 64 Cal.App.4th at pp. 1154-1156.) After a lengthy analysis, which we need not repeat here, the court in *Molen* concluded that it had no reason to decide whether the "well-pleaded complaint doctrine" set forth in Witkin is correct, because in any event it did not apply in that case, which was not a direct appeal of a default judgment but rather an appeal from a judgment based on a collateral attack on a default judgment. Consequently, whether the default judgment itself stated a cause of action was not an issue it needed to decide.[4] (*Id.* at pp. 1156-1157.)

We, of course, must decide whether the Witkin doctrine does apply in a direct appeal. We hold that it is not a correct statement of the law, based on binding precedent from the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Based on that authority, we conclude that a default judgment may be entered on a complaint, even though a timely demurrer might have been sustained if one had been filed, as long as the court has personal and subject matter jurisdiction and the complaint is sufficient to apprise the defendant of the nature of the plaintiff's demand. (*Christerson, supra,* 180 Cal. at pp. 525-526; see also *Trans-Pacific Trading Co. v. Patsy*

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[4] "A collateral attack will lie only for a claim that the judgment is void on its face for lack of personal or subject matter jurisdiction or for the granting of relief which the court has no power to grant. [Citations.] The lattermost category extends to a claim that a default judgment exceeds the amount demanded in the complaint. [Citation.] However, a collateral attack will not lie for a claim that the judgment is not supported by substantial evidence [citations] nor for failure of the complaint to state a cause of action [citation]. [¶] [Consequently, if] the complaint in the default action is sufficient to apprise the Molens of the nature of the Friedmans' demand, it is immaterial that it might have been subject to a demurrer for failure to make an allegation necessary to state a cause of action or warrant damages for loss of future rent." (*Molen, supra,* 64 Cal.App.4th at pp. 1156-1157.)

Frock & Romper Co (1922) 189 Cal. 509, 513-514 [reaffirming rule as stated in *Christerson*]; cf. *Williams v. Foss* (1924) 69 Cal.App. 705, 706-708 [where demurrer *was* filed and should have been sustained, subsequent default judgment must be reversed].) Here, the court had jurisdiction of the parties and of the subject matter and the complaint was sufficient to put Mazaheri on notice of Sanchez's claim. Consequently, even if we assume that Sanchez's complaint was demurrable, the default judgment is valid because Mazaheri did not demur to it.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING MAZAHERI'S MOTION FOR RELIEF FROM DEFAULT

To warrant setting aside a default under Code of Civil Procedure section 473, subdivision (b), the moving party must show that the default was taken by "mistake, inadvertence, surprise, or excusable neglect." The trial court's ruling on a Code of Civil Procedure section 473 motion will not be reversed except on a clear showing of abuse of discretion. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 694 (*Fasuyi*).)

Citing the policy which favors trying cases on their merits (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980), Mazaheri contends that the trial court abused its discretion in denying his motion to set aside the default because Sanchez's attorney admittedly gave no notice of her intent to seek default either to Mazaheri or to his attorneys, knowing that Mazaheri was out of the country.

There is no legal requirement that plaintiff's counsel give defendant or defense counsel a warning prior to requesting entry of default. It is a matter of professional

courtesy to do so, and courts will often set aside a default in the absence of such notice. (*Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038 (*Bellm*); see also 1 Weil & Brown, Civil Procedure Before Trial (2008), § 5:29.2, p. 5-9, citing State Bar California Attorney Guidelines of Civility and Professionalism § 15; Weil & Brown, *supra*, §§ 5:68-5:70, pp. 5-16–5-17.) Nevertheless, even in the absence of a notice by opposing counsel, the court has the discretion to refuse to set aside a default if the defendant does not make the necessary showing of inadvertence, mistake or excusable neglect. (*Bellm*, at p. 1038.)

Here, we cannot say that it was an abuse of discretion for the court to conclude that Mazaheri failed to make the necessary showing. Mazaheri was served with the summons and complaint on January 3, 2007, and his answer was due on February 2, 2007. The request for entry of default was not filed until March 28, 2007, nearly two months after Mazaheri's response was due. His request for relief from default was based on his claim that he was out of the country not when his response was due but at or around the time the request to enter default was filed and served.[5] Mazaheri did not give any reason for his failure to file a responsive pleading or request an extension of time to do so before he left the country, nor did he provide any basis for concluding that his failure to do so was the result of mistake, inadvertence or excusable neglect. He also did not connect his failure to file a response or request a time extension to his absence from the country. A party seeking relief from default must show a causal connection between

[5] According to Mazaheri's motion, he did not leave the country until March 22, 2007. He also stated that he did not leave the country until after the default was entered.

the proffered excuse and the failure to file a responsive pleading. (*Bellm*, *supra*, 150 Cal.App.3d at p. 1038.) In the absence of a showing of such a causal connection between his excuse—i.e., that he had to be out of the country—and his failure to file a timely response, it was reasonable for the trial court to conclude that Mazaheri failed to meet his burden to demonstrate an excuse or a justification for his failure to file a timely response to the complaint. Accordingly, we see no abuse of discretion in the trial court's denial of Mazaheri's motion.

Fasuyi, *supra*, 167 Cal.App.4th 681, on which Mazaheri relies, does not compel a different result. In that case, the defendant corporation sent the summons and complaint to its insurance broker and asked the broker to forward the documents to the corporation's insurer with instructions to provide a defense. The broker forwarded the complaint to the insurer and received confirmation that the insurer had received the documents, as well as contact information for the insured. The broker was under the impression that the insurer would contact the corporation directly, file an answer and undertake representation. Nevertheless, no responsive pleading was filed. Slightly more than two months after service of the summons and complaint, the plaintiff's attorney filed a request to enter default without contacting the corporation "or anyone else." (*Id*. at pp. 686-687.)

The court held that there was no fault on the part of the defendant corporation, and no neglect, even of an excusable variety, on its part. Consequently, under the circumstances, the court held that it was an abuse of discretion to deny the corporation

relief from default. (*Fasuyi, supra*, 167 Cal.App.4th at pp. 694, 697, 700-701, 702-703.) However, the court emphasized that its ruling was based on the particular facts of that case: "We do not mean to suggest, and certainly do not hold, that a defendant who has properly involved the insurer and nevertheless ends up in default is always entitled to relief. *Nor do we hold that a plaintiff's attorney must warn a defendant's attorney before taking a default.* We recognize that each situation is sui generis and must be analyzed accordingly. What we hold—and it is all we hold—is that the totality of the circumstances here demonstrated that Permatex was entitled to relief from the default and default judgment. And that not to grant that relief was an abuse of discretion, an abuse that was prejudicial to Permatex." (*Id*. at p. 703, emphasis added.)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiff Armando Rocha Sanchez.

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/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.

/s/ Hollenhorst
J.